No. 85-1414

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

LAPEYROUSE GRAIN CORPORATION and LAPEYROUSE GRAIN CORPORATION OF ALABAMA,

Petitioners,

vs.

FLORA JANE NELSON, doing business as W. J. NELSON COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

ROGER S. MORROW
*ROBERT M. ALTON, JR.
Counsel for Respondent
*Counsel of Record

OF COUNSEL:

WHITESELL, MORROW & ROMINE, P.C.
Post Office Box 2450
Montgomery, Alabama 36103-2450
Telephone: (205) 262-1967

ROBERT M. ALTON, JR.
302 Corporate Square
555 South Perry Street
Montgomery, Alabama 36104
Telephone: (205) 834-8661

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

QUESTIONS PRESENTED

1. Does the United States Supreme Court have jurisdiction in this case due to the fact Petitioners have failed to exhaust their remedies in the Supreme Court of Alabama and due to the fact the Supreme Court of Alabama has entered an order reinstating Petitioners' appeal?

2. Whether the Supreme Court of Alabama's dismissal of an appeal filed by Petitioners, Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama, constitutes a denial of due process of law and equal protection of the law pursuant to the Fourteenth Amendment to the United States Constitution when the appeal was dismissed pursuant to the Alabama Rules of Appellate Procedure more than forty-two (42) days after denial by operation of law of Petitioners' post-trial motions?

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vs.

FLORA JANE NELSON, doing business as W. J. NELSON COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that the Court deny the petition for a writ of certiorari to review the decision, judgments and orders of the Supreme Court of Alabama filed on October 11, 1985, November 22, 1985, and December 10, 1985.

OPINIONS BELOW

The petition for writ of certiorari filed by Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama (hereinafter collectively referred to as Lapey-

rouse) is not complete in its citations of the opinions and judgments issued by the Supreme Court of Alabama. In addition to the opinions and judgments cited by Petitioners, the Supreme Court of Alabama entered an order on February 28, 1986, in Case No. 84-342. A copy of that order is reproduced in the Appendix, *infra,* at B-34. The order of the Supreme Court of Alabama issued on February 28, 1986, reinstated an appeal filed by Lapeyrouse which is the appeal that Lapeyrouse is claiming denied them due process of law and equal protection of the law. The order of February 28, 1986, has not been reported as of this date. On March 6, 1986, the Supreme Court of Alabama also issued two additional orders which have not been reported but which are reproduced in the Appendix, *infra,* at B-36, 38). The two orders of the Supreme Court of Alabama dated March 6, 1986, clarified the court's earlier order of February 28, 1986, which reinstated Lapeyrouse's appeal in Case No. 84-342.

Petitioners refer to an order issued by the Supreme Court of Alabama on January 28, 1986, which dismissed their appeal in Case No. 85-393. Since the filing of the petition for writ of certiorari, the Supreme Court of Alabama has entered an additional order on February 28, 1986, which denied Lapeyrouse's application for rehearing in Case No. 85-393. A copy of the denial of the application for rehearing issued by the Supreme Court of Alabama on February 28, 1986, is reproduced in the Appendix, *infra,* at B-33.

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STATEMENT OF JURISDICTION

This Honorable Court does not have jurisdiction in this case. Lapeyrouse contends in its statement of jurisdiction that jurisdiction is conferred on this Court by 28 U.S.C. § 1257(3). Flora Jane Nelson (hereinafter referred to as Nelson) asserts that 28 U.S.C. § 1257 prohibits jurisdiction in this case. The reason that jurisdiction is objected to by Nelson is that 28 U.S.C. § 1257 requires a final judgment to be rendered by the highest court of the state before jurisdiction is conferred. Jurisdiction is not conferred on this Court in this case because a final judgment as contemplated by § 1257 has not been entered herein and Lapeyrouse has not exhausted its remedies or appeals in the courts of the State of Alabama.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions cited by Lapeyrouse in its petition for writ of certiorari, the following constitutional and statutory provisions are also involved in this case:

1. 28 U.S.C. § 1257 provides in pertinent part as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is

drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of or commission held or authority exercised under, the United States."

2. Rule 58 of the Alabama Rules of Civil Procedure provides in pertinent part as follows:

"Rule 58.

Rendition and entry of judgments and orders.

(a) *Rendition of judgments and orders.* A judge may render his order or judgment: (1) by notation thereof upon his bench notes without any other or further written document, or (2) by execution a separate written document, or (3) by including the order of judgment in his opinion or memorandum, or (4) by simply appending to his opinion or memorandum or including therein his direction as to the order or judgment sought to be entered.

(b) *Sufficiency of judgment, order or minute entry thereof.* A judgment or order, or the minute entry thereof, need not be phrased in formal language nor bear particular words of adjudication. The judgment or order or the minute entry thereof will be sufficient if it is signed or initialed by the judge and indicates an intention to adjudicate, considering the whole record, and if it indicates the substance of the adjudication.

(c) *Entry of judgment or order.* Upon rendition of a judgment or order as provided in subdivision (a) of this rule, unless it contains a specific direction otherwise or is subject to the provisions of Rule 54(b), the clerk shall note

> such judgment or order forthwith in the civil docket if separately maintained. Notation of a judgment or order on separately maintained bench notes or in the civil docket or the filing of a separate judgment or order constitutes the entry of the judgment or order. The entry of the judgment or order shall not be delayed for the taxing of costs."
>
> * * *

STATEMENT OF THE CASE[1]

The statement of the case set forth by Petitioners, Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama (hereinafter referred to collectively as Lapeyrouse), in this case is incomplete, misleading, and incorrect in many regards. For this reason and for compliance with the rules of this Court, Respondent, Flora Jane Nelson, individually and d/b/a W. J. Nelson Company (hereinafter referred to as Nelson), will set forth the following statement of the case.

This action was commenced on or about the 27th day of January, 1983, by the filing of a complaint by Flora Jane Nelson, individually and doing business as W. J. Nelson Company, against the Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama and various fictitious parties. In Nelson's complaint, Nelson sought damages against Lapeyrouse for, *inter alia,* breach

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[1]References to Appendix "A" are to the appendix contained in the Petition for Writ of Certiorari to the Supreme Court of Alabama filed by the Petitioners herein. References to Appendix "B" are to the appendix to Respondent's Brief in Opposition.

of fiduciary duty, and Nelson sought an accounting of certain disputed items concerning a running account between merchants. (A-29) Subsequent to the filing of the original complaint, Nelson amended her complaint to add additional counts setting forth, *inter alia,* a cause of action against Lapeyrouse for conversion. (B-1)

On or about July 26, 1984, this case came to trial in the Circuit Court of Baldwin County, Alabama. The case was tried by a jury and on July 30, 1984, the jury returned a verdict in favor of the Plaintiff and against the Defendants on Plaintiff's claims and assessed Plaintiff's damages at $561,537.47. The jury also found in favor of Nelson against Lapeyrouse on Lapeyrouse's counterclaim. Judgment was entered on the verdict on August 9, 1984. (A-8; A-23) On August 8, 1984, Lapeyrouse filed post-trial motions for judgment notwithstanding the verdict and motion for new trial. (A-8; A-23) Rule 59.1 of the Alabama Rules of Civil Procedure requires that a motion for new trial must not remain pending for more than ninety days and, thus, it is denied by operation of law at the expiration of the ninetieth day. (See page 3 of Petition) The trial court did not file or enter an order on Lapeyrouse's post-trial motions by November 6, 1984, which was the ninetieth day after the filing of Lapeyrouse's post-trial motions. (A-26; A-52) The trial court did draft and sign an order granting a motion for new trial which was dated November 5, 1984, but this motion was not filed with the Circuit Clerk of Baldwin County, Alabama, until November 8, 1984. (A-26; Affidavit of Barbara M. Judge, B-4)

Rule 4 (a) (3) of the Alabama Rules of Appellate Procedure provides that a party has forty-two (42) days from the date of the entry of the judgment or order appealed

from within which to file a notice of appeal with the clerk of the trial court. (A-106) The effective date for purposes of computing time under the Alabama Rules of Civil and Appellate Procedure is the date the order is filed. (A-10; A-104; A-106) Under Rule 4 (a) (3) of the Alabama Rules of Appellate Procedure, the filing of a post-judgment motion for judgment notwithstanding the verdict and new trial suspends the running of the time for filing a notice of appeal until the date of the entry of an order granting or denying the post-judgment motion or until the operation of Rule 59.1 of the Alabama Rules of Civil Procedure. (A-106; Page 3 of petition)

On December 13, 1984, Nelson filed a precautionary notice of appeal to the Supreme Court of Alabama from the void order of the trial court which attempted to grant Lapeyrouse's motion for new trial after the expiration of the ninety day period provided for in Rule 59.1 of the Alabama Rules of Civil Procedure. (A-52) On December 26, 1984, Lapeyrouse filed a notice of cross-appeal to the Supreme Court of Alabama from the trial court's denial of Lapeyrouse's motion for judgment notwithstanding the verdict with respect to Nelson's complaint and with re-respect to the counterclaim, specifically stating that those denials occurred as a matter of law on November 6, 1984, due to the operation of Rule 59.1 of the Alabama Rules of Civil Procedure. (A-54) The order of the trial court filed on November 8, 1984, was void in that the trial court lost jurisdiction to grant a new trial and consequently, Plaintiff's notice of appeal filed on December 13, 1984, and Defendants' notice of appeal filed on December 26, 1984, were nullities and void. (A-8) Plaintiff's notice of appeal was clearly an appeal from the grant of a new trial pursuant

to Section 12-22-10, *Code of Alabama, 1975,* and Plaintiff did not need or desire an appeal if the order granting new trial was void. (B-6) Neither Plaintiff *nor Defendants* filed an appeal from the judgment of $561,537.47; thus both notices of appeal were also nullities.

Nelson filed on January 28, 1985, a Petition for Writ of Mandamus with the Supreme Court of Alabama requesting the Court to issue a Writ of Mandamus commanding the trial court to vacate the void order granting Lapeyrouse's motion for new trial, and to further order that the judgment in favor of Nelson be reinstated. (B-7) Nelson also requested that her Petition for Writ of Mandamus as well as her purported appeal and the purported cross-appeal of Lapeyrouse be consolidated. (B-20) Nelson also filed a motion to dismiss Lapeyrouse's cross-appeal as untimely. (B-23) The motion to dismiss was filed due to the fact that Defendants' notice for cross-appeal was filed more than forty-two (42) days after the automatic denial on November 6, 1984, of Defendants' post-trial motions, and was thus untimely. (A-54; A-106)

On September 27, 1985, the Supreme Court of Alabama rendered an opinion denying Nelson's Petition for Writ of Mandamus. (A-1) On September 30, 1985, the Supreme Court of Alabama ordered *ex mero motu* that the Petition for Writ of Mandamus be placed on rehearing. (B-26) On October 11, 1985, the Supreme Court of Alabama granted Nelson's Petition for Writ of Mandamus and dismissed the superfluous appeal of Nelson in Case No. 84-294, *Nelson v. Lapeyrouse Grain Corporation,* and dismissed the cross-appeal of Lapeyrouse in Case No. 84-342, *Lapeyrouse Grain Corporation v. Nelson.* (A-8; A-12; A-15; A-16; A-17)

The substance of the opinion and order of the Supreme Court of Alabama was to the effect that a notice of appeal from a void order granting a new trial will not support an appeal and, thus, does not operate to extend the time for filing a cross-appeal under Rule 4 (a) (2) of the Alabama Rules of Appellate Procedure; therefore, Lapeyrouse's appeal was not timely filed. On application for rehearing filed by Lapeyrouse on or about October 25, 1985, Lapeyrouse raised for the first time any issues regarding an alleged deprivation of its constitutional rights. (A-69) The Supreme Court of Alabama overruled Lapeyrouse's application for rehearing on November 22, 1985. (A-12)

On December 10, 1985, the Supreme Court of Alabama entered an order setting aside the void order of the trial court purporting to grant new trial to Lapeyrouse. (A-17) On this same date the Supreme Court of Alabama issued two certificates of judgment which dismissed the appeal of Nelson and the cross-appeal of Lapeyrouse. (A-15, A-16) By order entered on December 16, 1985 (dated December 12, 1985), the trial judge set aside his void order filed November 8, 1984. (A-28)

On January 6, 1986, Lapeyrouse filed a notice of appeal to the Supreme Court of Alabama from the order of the trial judge complying with the Writ of Mandamus issued by the Alabama Supreme Court. (A-91) On January 17, 1986, Nelson filed with the Supreme Court of Alabama a motion to dismiss the appeal of Lapeyrouse. (B-27) On January 28, 1986, the Supreme Court of Alabama dismissed the appeal of Lapeyrouse taken from the order of the trial judge complying with the Writ of Mandamus issued by the Supreme Court of Alabama. (A-19)

The application for rehearing filed by Lapeyrouse was overruled on February 28, 1986. (B-33)

On February 28, 1986, the Supreme Court of Alabama also ordered, *ex mero motu,* that the cross-appeal of Lapeyrouse in Case No. 84-342 be reinstated. (B-34) On March 6, 1986, the Supreme Court of Alabama ordered that the appeal of Nelson in Case No. 84-294, also be reinstated. (B-36) On March 6, 1986, the Supreme Court of Alabama entered a second order clarifying its prior orders stating that its prior orders issuing the Writ of Mandamus in Case No. 84-424, were unaffected by the Court's orders reinstating the appeals in Case Nos. 84-294 and 84-342. The reinstated appeals in Case Nos. 84-294 and 84-342 are currently pending before the Supreme Court of Alabama. On March 13, 1986, Respondent filed an application for rehearing concerning the reinstatement of Lapeyrouse's appeal and a motion to dismiss the appeal of Lapeyrouse. (B-41, 46) As of the date of the completion of this brief the Supreme Court of Alabama has not ruled on these motions.

In a corollary but related proceeding, Lapeyrouse filed on December 11, 1985, an independent action pursuant to Rule 60(b) of the Alabama Rules of Civil Procedure for relief from the judgment in the Circuit Court of Baldwin County, Alabama. This action was filed as a result of the Supreme Court of Alabama's issuance of the Writ of Mandamus in Case No. 84-424 and as a result of the dismissal of Lapeyrouse's appeal in Case No. 84-342. The Circuit Court of Baldwin County (Judge Norton) dismissed the Rule 60(b) action on January 3, 1986. (B-51) Lapeyrouse filed a notice of appeal from that order of dismissal and that appeal is currently pending before the Supreme Court of Alabama as Case No. 85-471. (B-56, 57)

Due to the pendency of the three appeals in the Supreme Court of Alabama it is obvious that Petitioners have not exhausted their remedies in the Courts of Alabama and the Petition for Writ of Certiorari should be summarily denied. This is certainly true since the Supreme Court of Alabama is reconsidering the dismissal of Lapeyrouse's appeal in Case No. 84-342, the dismissal of which is the source of Lapeyrouse's complaint of a purported denial of equal protection of law and due process of law.

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SUMMARY OF THE ARGUMENT WHY THE WRIT SHOULD BE DENIED

Lapeyrouse's petition for writ of certiorari to the Supreme Court of Alabama should be denied for the following reasons:

1. The Court does not have jurisdiction in this case due to the fact that Lapeyrouse has not exhausted its remedies in the Supreme Court of Alabama and the Supreme Court of Alabama has not yet entered a final judgment as contemplated by 28 U.S.C. § 1257.

2. The decision of the Alabama Supreme Court did not deny Lapeyrouse due process of law or equal protection of law.

It is absolutely clear in this case that the Supreme Court of the United States does not have jurisdiction in this case due to the fact that Lapeyrouse has not exhausted its remedies in the state courts of Alabama. On February 28, 1986, the Supreme Court of Alabama entered an order

reinstating Lapeyrouse's appeal, the dismissal of which was the basis of Lapeyrouse's claim of denial of due process of law and equal protection under the law. (B-34) On March 13, 1986, Nelson filed an application for rehearing concerning the reinstatement of Lapeyrouse's appeal and also a motion to dismiss Lapeyrouse's appeal. Respondent Nelson is claiming that the Supreme Court of Alabama had previously issued a final judgment and that the Supreme Court of Alabama did not have jurisdiction to reinstate Lapeyrouse's appeal; however, the Supreme Court of Alabama has not yet ruled in favor of Respondent Nelson and has not yet decided that issue.

Thus, as of the date of the filing of Respondent's brief, the Supreme Court of Alabama has not finally dismissed Lapeyrouse's appeal; therefore a final judgment has not been entered by the Supreme Court of Alabama upon which 28 U.S.C. § 1257 would confer jurisdiction upon this court. It is absolutely clear due to the posture of the case before the Supreme Court of Alabama that the judgment of dismissal entered by the Alabama Supreme Court on December 10, 1985, is not final in the sense that no further proceedings can possibly take place in the State judicial system, nor can it be stated that the proceedings before the Alabama Supreme Court be characterized as certain, nor can it be stated that the proceedings will not have a significant effect on the constitutional issues of due process of law and equal protection of law raised by Lapeyrouse in their petition for writ of certiorari. *See, Minnick v. California Department of Corrections,* 452 U.S. 105 (1980); *Cox Broadcasting Corporation v. Cohn,* 420 U.S. 469 (1975).

Notwithstanding that this Court does not have jurisdiction to grant certiorari in this case, Lapeyrouse's petition for writ of certiorari should be denied because it is absolutely evident that Petitioners have not been denied due process of law or equal protection of the law. The Supreme Court of Alabama dismissed Lapeyrouse's appeal because the court did not have jurisdiction due to the fact the Lapeyrouse's notice of appeal was filed more than forty-two (42) days after the automatic denial of Lapeyrouse's post-trial motions on November 6, 1984. Under Rule 4 of the Alabama Rules of Civil Procedure, an appeal must be filed within forty-two (42) days in order to invoke the jurisdiction of the Supreme Court of Alabama. The dismissal of Lapeyrouse's appeal involved questions that were totally interrelated with the Alabama Rules of Civil Procedure which are peculiar to the State of Alabama, the constitutionality of which were not at issue in this case and do not warrant an exercise of certiorari jurisdiction of this Court. *See, Duncan v. Tennessee,* 405 U.S. 127 (1972). This is simply a case where Lapeyrouse failed to timely file an appeal pursuant to state law and their appeal was dismissed. Such a dismissal does not constitute a denial of due process of law or equal protection of the law and the petition for writ of certiorari should be denied.

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ARGUMENT SUPPORTING REASONS FOR DENYING CERTIORARI

A. The Court Does Not Have Jurisdiction in This Case Due to the Fact That Lapeyrouse Has Not Exhausted Its Remedies in the Supreme Court of Alabama and due to the fact the Supreme Court of Alabama Has Not Yet Entered Final Judgment as Provided For in 28 U.S.C. § 1257.

28 U.S.C. § 1257 states in pertinent part as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . ."

In this case due to the pendency of various proceedings before the Supreme Court of Alabama, a final judgment as contemplated in 28 U.S.C. § 1257 has not been rendered by the Supreme Court of Alabama. This is proven by the fact that the Supreme Court of Alabama entered an order reinstating Lapeyrouse's appeal in Case No. 84-342. (B-34)

Subsequent to the entry of the order of the Supreme Court of Alabama reinstating Lapeyrouse's appeal in Case No. 84-342, Nelson has filed an application for rehearing and a motion to dismiss Lapeyrouse's appeal in Case No. 84-342. (B-41, 46) In both the motion to dismiss and the application for rehearing, Nelson is contending that the Supreme Court of Alabama's certificate of judgment entered on December 10, 1985, dismissing Lapeyrouse's appeal in Case No. 84-342 is a final judgment and that the Supreme Court of Alabama does not have the authority or jurisdiction to reinstate that appeal. (B-41, 46) The motion and application for rehearing have been briefed by Nelson, but the Supreme Court of Alabama has not ruled on

these matters, and as of the date of this brief, Lapeyrouse's appeal concerning the judgment entered in favor of Nelson for $561,437.47 on July 30, 1984, is currently pending before the Supreme Court of Alabama. This being the case, Lapeyrouse has not exhausted its remedies in the courts of the State of Alabama and a final judgment as contemplated by 28 U.S.C. § 1257 and as interpreted by the United States Supreme Court has not been entered in this case. This being true, this Court does not have jurisdiction of this matter and the petition for writ of certiorari should be denied.

The finality requirement limiting the jurisdiction of the United States Supreme Court to review a State court judgment serves several ends which are as follows:

1. It avoids piecemeal review of State court decisions;

2. It avoids giving advisory opinions in cases where there may be no real case of controversy in the sense of Article III; and

3. It limits review of State court determinations of federal constitutional issues to leave at a minimum intrusion in State affairs. U.S.C.A. Article III, § 1, et seq.; *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973).

The requirements by Congress that review of state court judgments be final was succinctly stated in the case of *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945), as follows:

> ". . . This requirement has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and of

> delayed justice. Only in very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for federal appellate jurisdiction. This prerequisite to review derives added force when the jurisdiction of this Court is invoked to upset the decision of a State court. . . ." 326 U.S. at 124.

It is axiomatic that a party must have exhausted his remedies before the State appellate courts before the United States Supreme Court will review a decision of the highest court of that particular State. To invoke the jurisdiction of this Court, the outcome of further proceedings of the State court have to be characterized as certain or that further proceedings in the State court will not have a significant effect on the federal constitutional issues presented by certiorari petition. *Minnick v. California Department of Correction,* supra. In some rare cases, a state court's decision of a federal issue can be treated as a final judgment even though additional proceedings in a State court are anticipated. *Cox Broadcasting Corporation v. Cohn,* supra; *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.,* supra. In order to meet one of these exceptions, however, it has to be evident that further proceedings in the State court will not have a significant effect on the federal constitutional issue presented in the certiorari petition or the petition for writ of certiorari will be dismissed. *Minnick v. California Department of Correction,* supra.

In this case it is clear that the additional rulings that will have to be made by the Supreme Court of Alabama will have a significant effect on the constitutional issues raised by Lapeyrose. If the Supreme Court of Alabama does not rule in favor of Nelson on her motion to dismiss

and application for rehearing, Lapeyrose will be granted an appeal and their claim for denial of due process and equal protection of the law will be moot. The petition for writ of certiorari currently before the Court in this case is a clear attempt at piecemeal appellate review which is not favored by this Court. *Goldstein v. Cox,* 396 U.S. 471 (1970).

Another reason that Lapeyrouse has not exhausted its remedies in the Courts of Alabama is the fact that Lapeyrouse also has pending an appeal before the Supreme Court of Alabama in Case No. 85-471. (B-56, 57) Lapeyrouse's appeal before the Supreme Court of Alabama in Case No. 85-471 is an appeal from a dismissal by the Circuit Court of Baldwin County, Alabama, of Lapeyrouse's independent action for relief from judgment. This action was filed by Lapeyrouse pursuant to Rule 60(b) of the Alabama Rules of Civil Procedure. Rule 60(b) of the Alabama Rules of Civil Procedure is basically the same rule as contained in the Federal Rules of Civil Procedure. The Circuit Court of Baldwin County, Alabama, dismissed Lapeyrouse's action and refused to set aside the judgment of $561,537.47 and refused to grant Lapeyrouse a new trial. (B-51) Lapeyrouse then filed a notice of appeal to the Supreme Court of Alabama. (B-56) That appeal is currently pending before the Supreme Court of Alabama and was pending at the time this petition for writ or certiorari was filed. As of the date of this response, briefs have not been filed with the Supreme Court of Alabama in that appeal. Due to the pendency of that appeal, Lapeyrouse has not exhausted its remedies in the Supreme Court of Alabama concerning the issues raised in this petition for writ of certiorari.

Due to the pendency of three appeals in the Supreme Court of Alabama, it is obvious that Petitioners have not exhausted their remedies in the Supreme Court of Alabama and the petition for writ of certiorari should be summarily denied. This is certainly true since the Supreme Court of Alabama has currently reinstated Lapeyrouse's appeal, which is the source of Lapeyrouse's complaint of denial of equal protection of law and due process of law.

B. The Dismissal of Lapeyrouse's Appeal by the Supreme Court of Alabama Did Not Constitute a Denial of Equal Protection of Law or Due Process of Law.

The thrust of Lapeyrouse's argument in their petition for writ of certiorari is that they have suffered a deprivation of property while being denied due process of law and equal protection of law due to the Supreme Court of Alabama's ruling that the trial court's order granting a new trial was void and that Lapeyrouse had not filed a timely notice of appeal from the judgment; therefore, the appeal was due to be dismissed. This argument on the part of Lapeyrouse is without merit and does not set forth adequate cause for this Court to grant the petition for writ of certiorari.

Lapeyrouse, in their petition for writ of certiorari, has misrepresented the facts surrounding the basis of the opinion rendered by the Supreme Court of Alabama on October 11, 1985. Lapeyrouse argues to this Court that the Supreme Court of Alabama by judicial interpretation modified the Alabama Rules of Civil Procedure and thus arbitrarily and capriciously denied Lapeyrouse the right of an appeal. Lapeyrouse goes further to argue that prior

to October 11, 1985, Rule 59.1 did not require the entry of an order for the order to effectively dispose of a post-judgment motion. This argument is simply a mischaracterization of the law of Alabama and the facts in this case.

The opinion of the Supreme Court of Alabama rendered on October 11, 1985, is made a part of the Appendix to the petition for writ of certiorari and appears on page A-8. As is shown in the opinion, the Supreme Court of Alabama ruled that an order must be entered pursuant to Rule 58 of the Alabama Rules of Civil Procedure for the order to become effective. The court further ruled that under Rule 59.1 of the Alabama Rules of Civil Procedure, a post-judgment motion cannot remain pending for more than ninety (90) days. Under Alabama law, the failure of a trial court to dispose of a pending motion within ninety (90) days constitutes an automatic denial of that motion. Under Alabama case law and under the Alabama Rules of Civil Procedure, the trial court loses jurisdiction to grant a new trial if the entry of the order is not made within the ninety (90) day period. In this case the order granting new trial was a separate written opinion which was not filed with the Circuit Clerk until November 8, 1984. The order was apparently signed on November 5, 1984, but the order was not effective because it was not filed with the Clerk until November 8, 1984; thus, the order was void since it was filed two days after the ninety (90) day period provided for by Rule 59.1 of the Alabama Rules of Civil Procedure had expired.

Lapeyrouse incorrectly argues in brief that the Supreme Court of Alabama ruled, after all period of appeal for either side had run, that Rule 59.1 required the clerk

to take ministerial action on the written judgment within the ninety (90) day period for the trial court's order to become effective. This is an incorrect statement of the holding of the Supreme Court of Alabama. What the Supreme Court of Alabama held was that the trial judge must take action under Rule 58, Alabama Rules of Civil Procedure, to effectively enter the order in order for that order to become effective and dispose of a post-judgment motion. If the trial court does not make the order effective through the entry of the order prior to the expiration of ninety (90) days pursuant to Rule 59.1, the court has not effectively disposed of the motion and the trial court loses jurisdiction to set aside a judgment pursuant to a post-trial motion. This was made clear in the special concurrence of Chief Justice Torbert which was rendered on November 22, 1985, and which is attached as A-12 of the Appendix to the petition for writ of certiorari.

Lapeyrouse makes a grave mischaracterization of the law when they attempt to argue that the Supreme Court of Alabama changed the rules of procedure by rendering its opinion of October 11, 1985. This is simply not true. As is shown in the special concurrence of Chief Justice Torbert, the trial court can effectively act upon a motion by ruling on it by any of the means set forth in Rule 58(a) of the Alabama Rules of Civil Procedure. The Chief Justice then stated that an order or judgment is not effective for purposes of disposing of a post-judgment motion until an entry of the judgment or order is made. As the Chief Justice stated, this has to be the rule and it is comparable to Rule 58 of the Federal Rules of Civil Procedure; the intent of both rules being "to resolve the same problem, i.e., when is an order or judgment an order or judgment?"

It is ironic that Lapeyrouse now comes to the federal courts in an attempt for relief since the Federal Rules of Civil Procedure have always clearly required an entry of the judgment or order before that judgment or order becomes effective. This is shown from the quote from 11 C. Wright and A. Miller, *Federal Practice and Procedure* § 2781 at 6 (1973), which was quoted by Chief Justice Torbert, and which reads as follows:

> "Rule 58 is intended to resolved 'the old, old question of when is a judgment a judgment.' It is of great importance in litigation to know precisely what the judgment is and when it was entered. The time in which to make post-trial motions runs from the entry of judgment as does the time when execution may issue. Most important, however, is the fact that the time for appeal runs from the entry of judgment."

It is interesting to note that Lapeyrouse does not reference the cases relied upon by the Alabama Supreme Court which clearly demonstrated that the filing of a judgment or order was required for that judgment or order to be effective. Examples of the cases of the Supreme Court of Alabama requiring that a separate written judgment must be filed before that judgment can be effective are *Lacks v. Stribling*, 406 So.2d 926 (Ala. Civ. App. 1981); *Holmes v. Powell*, 363 So.2d 760 (Ala. 1978); and *Thompson v. Keith*, 365 So.2d 971 (Ala. 1978). These cases were rendered long before the facts of this case ever developed. An analysis of the Alabama cases on point clearly demonstrates that the Supreme Court of Alabama was correct in granting the petition for writ of mandamus and in declaring the trial court's order granting new trial to be void and outside the ninety (90) day period provided by Rule 59.1 of the Alabama Rules of Civil Procedure. Further-

more, the Courts of Alabama clearly have the power to construe their own rules of civil procedure.

Lapeyrouse also argues in their petition for writ of certiorari that the Supreme Court of Alabama arbitrarily and capriciously denied it a right of appeal. Lapeyrouse's argument to this effect is very weak since apparently it is based on an argument that the Supreme Court of Alabama changed the requirements of Rule 59.1 and that the decision of the Supreme Court of Alabama interpreting Rule 59.1 could not have been anticipated. Such argument is simply without merit.

The appellate courts of the State of Alabama have been very strict in requiring that a notice of appeal be timely filed in order for a party to obtain a right of appeal. The courts have particularly been strict in ruling that a trial court has no jurisdiction to enter an order pursuant to Rule 59 of the Alabama Rules of Civil Procedure where more than ninety (90) days have passed from the time of the party's post-trial motion for new trial or rehearing, and in dismissing appeals that were filed more than forty-two (42) days from the date of the automatic denial under Rule 59.1 of the Alabama Rules of Civil Procedure. *See, Thompson v. Keith,* supra; *Crowder v. Zoning Board of Adjustment,* 406 So.2d 917 (Ala. Civ. App. 1981), *cert. den'd,* 406 So.2d 919 (Ala. 1981); *Carnes v. Carnes,* 365 So.2d 981 (Ala. Civ. App. 1978). Under Alabama law, a trial court has never had the jurisdiction, since the passage of the Alabama Rules of Civil Procedure, to enter an order pursuant to Rule 59 of the Alabama Rules of Civil Procedure where more than ninety (90) days have passed from the time of filing of the party's post-trial motion for new trial, and the time period has not been extended

as provided for in the rule. *French v. Steel, Inc.*, 445 So. 2d 561 (Ala. 1984); *Thompson v. Keith*, supra. Under Alabama law a post-trial motion is pending as of its filing until acted upon by the court and the ninety (90) day period begins to run from the date of filing. *State v. Wall*, 348 So.2d 482 (Ala. 1977). Thus, the argument by Lapeyrouse that the ruling of the Supreme Court of Alabama in its opinion of October 11, 1985, could not be anticipated and was a change of the Alabama Appellate Courts' interpretation of the Alabama Rules of Civil Procedure is simply ludicrous. The decision and opinion of the Supreme Court of Alabama on the petition for writ of mandamus in Case No. 84-424 was easily foreseeable and that is why Nelson's attorneys filed the petition for writ of mandamus.

The reason the Supreme Court of Alabama dismissed the appeal of Lapeyrouse is Lapeyrouse did not timely file a notice of appeal from the judgment for $561,537.47. Lapeyrouse did file a notice of cross-appeal after a precautionary notice of appeal was filed by Nelson from the void order granting Lapeyrouse a new trial. (A-52; A-54) Lapeyrouse's notice of appeal was originally dismissed by the Supreme Court of Alabama due to the fact that Lapeyrouse's notice of cross-appeal was filed on December 26, 1984, which was more than forty-two (42) days from November 6, 1984, which was the date of the automatic denial of the post-trial motions. Lapeyrouse argues to this Court, as it did to the Supreme Court of Alabama, that Rule 4(a) of the Alabama Rules of Appellate Procedure operated to bootstrap their cross-appeal into a timely appeal. This argument was based upon the fact that Nelson filed a precautionary notice of appeal from the trial court's

void order granting new trial. This argument is without merit.

Lapeyrouse contends that the fact Nelson originally filed a notice of appeal from the void order of the trial court granting new trial proved that Nelson's attorneys also thought the order was effective. This is not true. Nelson filed a precautionary notice of appeal in order to cover herself in case the Supreme Court of Alabama for some unexplained reason ruled the trial court's order to be effective or to have been timely filed. Nelson's attorneys elected to take a precaution to protect themselves in case the Supreme Court of Alabama did not rule in their favor. Unlike the precautionary attitude adopted by Nelson's attorneys, attorneys for Lapeyrouse took the approach of not filing a precautionary notice of appeal in case the trial court's order was determined to be void. Since Lapeyrouse did not protect themselves by filing a timely notice of appeal, they deprived themselves of an appeal when the Supreme Court of Alabama correctly ruled that the trial court's order granting new trial was void.

Lapeyrouse's argument concerning the fourteen (14) day period provided for in Rule 4a of the Alabama Rules of Appellate Procedure is also without merit due to the fact that it only applies if an effective appeal is filed within the required forty-two (42) day period. In this case an effective notice of appeal was never filed since the appeal filed by Nelson was an appeal from a void order. Since Nelson filed a notice of appeal from the trial court's order which was a nullity, Nelson's appeal could not operate to bootstrap Lapeyrouse's cross-appeal into a timely filed appeal. This was the reason the Supreme Court of

Alabama originally dismissed Lapeyrouse's appeal which is shown from the following quote from the opinion:

> "Plaintiff filed a notice of appeal and this petition for writ of mandamus. The defendant Lapeyrouse filed a cross-appeal from the order of the trial court denying its motion for judgment notwithstanding the verdict. For the reasons set out below, the plaintiff's appeal is due to be dismissed and the writ of mandamus is due to be issued. The defendant Lapeyrouse's cross-appeal from the order denying its motion for judgment notwithstanding the verdict is due to be dismissed because it was not filed within forty-two (42) days of the order appealed from. It is interesting that the notice of cross-appeal expressly recognizes, and correctly so, that Lapeyrouse appeals 'from the trial court's denial of said defendants' motion for judgment notwithstanding the verdict . . . which denial . . . occurred as a matter of law on November 6, 1984, pursuant to ARCP Rule 59.1.' The notice of cross-appeal was filed on December 26, 1984, beyond forty-two (42) days from November 6, 1984. The plaintiff's superfluous notice of appeal from the purported order granting the motion for new trial would not support an appeal—which the plaintiff recognized and, therefore, filed the petition for writ of mandamus—and does not operate to extend the time for filing the cross-appeal under ARAP Rule 4(a) (2)." (A-9, 10)

Thus, it is clear and logical why the appeal of Lapeyrouse was originally dismissed by the Supreme Court of Alabama. The appeal was not timely filed and, therefore, the Supreme Court of Alabama did not have jurisdiction. Furthermore, the notice of cross-appeal filed by Lapeyrouse was never intended to be an appeal from the judgment entered in favor of Nelson and the notice of appeal fails to state that it is an appeal from that judgment.

It is indeed interesting to note — as pointed out by the Supreme Court of Alabama — that Lapeyrouse expressly recognized in the notice of cross-appeal that all the post-trial motions pending before the trial court were effectively denied on November 6, 1984, by operation of law. Thus, the notice of cross-appeal filed by Lapeyrouse expressly demonstrates that the attorneys for Lapeyrouse were well aware that Rule 59.1 operated to deny all post-trial motions and started the running of the time periods for filing notices of appeal.

The above argument is made to this Court in order to clarify the rulings of the Supreme Court of Alabama. As pointed out earlier in this brief, the Supreme Court of Alabama has not finally disposed of the question of whether Lapeyrouse will be denied an appeal by operation of Alabama law. However, it is clear that Lapeyrouse was not arbitrarily or capriciously denied an appeal; and under the law as interpreted by this Court, Lapeyrouse is not entitled to have the petition for writ of certiorari granted.

It is axiomatic that appeals are a matter of right while the Supreme Court's certiorari decisions are wholly discretionary. *Durham v. United States,* 401 U.S. 481 (1971). It is also clear that this Court will not grant certiorari in a case to consider questions which seemingly present constitutional questions where it appears that those questions are interrelated with rules of court procedure peculiar to the particular state where the constitutionality of those rules are not at issue. *See, Duncan v. Tennessee,* 405 U.S. 127 (1972). In this case the constitutionality of the Alabama Rules of Civil Procedure — which are basically the same as the Federal Rules of Civil Procedure with minor variance — are not challenged as being unconstitutional.

As can be gleaned from the statement of facts and from the argument in this section of the brief, it is clear that the purported constitutional questions raised by Lapeyrouse are as interrelated with the Alabama Rules of Civil Procedure as any issue could ever be. Thus, on the authority of *Duncan v. Tennessee,* supra, certiorari should be denied in this case.

The petition for writ of certiorari should not be granted in this case because there simply will not be a denial of due process of law or equal protection of the law even if Lapeyrouse's appeal is finally dismissed by the Supreme Court of Alabama. This Court has long recognized, even in criminal cases, that due process or equal protection concepts do not require a state to provide an appellate system. *Ortwein v. Schwab,* 410 U.S. 656 (1973); *Lindsey v. Normet,* 405 U.S. 56 (1972); *Griffin v. Illinois,* 351 U.S. 12 (1956); *McKane v. Durston,* 153 U.S. 684 (1894). It is true, however, that once a state provides a right to appeal, that right of appeal cannot be granted for some litigants and capriciously or arbitrarily denied to others without violating the equal protection clause. *Lindsey v. Normet,* supra. However, to show a violation of the equal protection clause or the due process clause, it is imperative that the petitioner show that someone comparably situated has been treated differently from the certiorari petitioner. *National Union of Marine Cooks and Stewards v. Arnold,* 348 U.S. 37 (1954). In this case Lapeyrouse cannot show that another class of individuals have been treated differently, i.e., given an appeal under similar circumstances, and Lapeyrouse cannot show a denial of due process since discrimination cannot be shown

and since due process does not *per se* require that the state provide a right of appeal. In this case Lapeyrouse cannot show that they have been treated any differently from any other litigant in the State of Alabama.

Finally, the protection of the Fourteenth Amendment to the United States Constitution can only be invoked if the state deprives any person or denies him enforcement of a right guaranteed. U.S. Constitution, Amendment 14; *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70 (1955). It has not been the policy of the Supreme Court of the United States to satisfy scholarly interest in issues contained in appeals nor does it sit for the benefit of particular litigants. *Rice v. Sioux City Memorial Park Cemetery,* supra. Certiorari, in fact, should not be granted except in cases involving principles of settlement of which are important to the public. *Id.*

In this case, the Supreme Court of Alabama's opinion of October 11, 1985, did not arbitrarily or capriciously deny Lapeyrouse the right of appeal. Lapeyrouse has not been treated any differently than any other litigant in the State of Alabama. All courts, including this Court, require jurisdictional time periods for filing law suits or appeals. In this case Lapeyrouse's attorneys failed to meet these jurisdictional time periods and their appeal was dismissed. This does not constitute a denial of due process of law, nor does it constitute a deprivation of property without due process of law, nor does it constitute a denial of equal protection of law.

CONCLUSION

There is absolutely no basis for this Court to grant the petition for writ of certiorari filed by Lapeyrouse. The issues involved in this case have not been finally decided by the Supreme Court of Alabama; therefore, this court does not have jurisdiction. Even if this Court does determine that the decisions of the Supreme Court of Alabama are final, Lapeyrouse has not been arbitrarily or capriciously denied the right of appeal and Lapeyrouse has not been denied equal protection of law or due process of law. For the reasons stated herein, the petition for writ of certiorari should be summarily and immediately denied.

Respectfully submitted,

/s/ Roger S. Morrow
/s/ Robert M. Alton, Jr.

OF COUNSEL:

Whitesell, Morrow & Romine, P.C.
Post Office Box 2450
Montgomery, Alabama 36103-2450
Telephone: (205) 262-1967

302 Corporate Square
555 South Perry Street
Montgomery, Alabama 36104
Telephone: (205) 834-8661

APPENDIX

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APPENDIX

IN THE CIRCUIT COURT FOR
BALDWIN COUNTY, ALABAMA

CASE NUMBER CV-83-500016

FLORA JANE NELSON,
d/b/a W. J. NELSON COMPANY,

PLAINTIFF,

vs.

LAPEYROUSE GRAIN CORPORATION,
LAPEYROUSE GRAIN CORPORATION
OF ALABAMA, et al.,

DEFENDANTS.

FIRST AMENDMENT TO COMPLAINT

Comes now the Plaintiff in the above-styled cause and files this her first amendment to the complaint heretofore filed in this cause.

COUNT TWO

Plaintiff adopts the allegations of paragraphs 1 through 20 of the original complaint.

22. Plaintiff avers that the Defendants wrongfully converted to their own use funds belonging to the Plaintiff.

WHEREFORE, Plaintiff claims of the Defendants the sum of $1,000,000.00 as compensatory damages and the sum of $25,000,000.00 as punitive damages together with interest and costs thereof.

COUNT THREE

Plaintiff adopts the allegations of paragraphs 1 through 20 of the original complaint.

23. Plaintiff requests that an accounting be made between the Plaintiff and the Defendants giving effect to the sale on November 5, 1980 of 49,654½ bushels of soybeans at a market price of $9.37 per bushel for a total price of $465,262.66 and that from the accounting between the parties the interest and handling charges pertaining to this sale be removed and that the Defendants be required to pay to the Plaintiff the balance due and owing to Plaintiff together with interest and costs thereof.

COUNT FOUR

Plaintiff adopts the allegations of paragraphs 1 through 20 of the original complaint.

24. Plaintiff avers that prior to October 9, 1981, W. J. Nelson Company was a sole proprietorship, unincorporated entity, owned and operated solely by W. J. Nelson.

25. Plaintiff further avers that on or about October 9, 1981 W. J. Nelson deceased in Baldwin County, Alabama.

26. Plaintiff avers that any indebtedness of W. J. Nelson Company claimed by the Defendants prior and up to October 9, 1981 were debts against W. J. Nelson individually.

27. Plaintiff further avers that the estate of W. J. Nelson has been duly administered in Baldwin County, Alabama and that notices as required by law were published giving notice to all creditors to file claims against the estate of W. J. Nelson, deceased.

28. Plaintiff further avers that the Defendants failed and refused to file any claims for any indebtedness claimed to be owing them by W. J. Nelson Company against said estate.

29. Plaintiff avers that any and all claims of the Defendants arising out of any alleged indebtedness between the Defendants and W. J. Nelson, deceased, are therefore barred by the statute of nonclaims and that the Defendants are barred from asserting any claims against the Plaintiff, Flora Jane Nelson, for such indebtedness.

30. Plaintiff avers that the Defendants are indebted to the Plaintiff, Flora Jane Nelson, in the sum of $1,000,000.00 and that the Plaintiff is not indebted to the Defendants.

.....

Robert M. Alton, Jr.
Attorney for Plaintiff
Suite 302, Corporate Square
555 South Perry Street
Montgomery, Alabama 36104
(205) 834-8661

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing First Amendment to Complaint upon the Hon. Caine O'Rear, III, by placing a copy of same in the United States Mail, postage pre-paid and properly addressed.

This the — day of March, 1984.

.....

OF COUNSEL

STATE OF ALABAMA)
BALDWIN COUNTY)

AFFIDAVIT

Before me, Clara H. Smith, a notary public in and for said County and for said State, personally appeared, Barbara M. Judge, Court Clerk, III for the Circuit Court of Baldwin County, who is known to me and who first being duly sworn, doth depose and say as follows, to wit;

1. My name is Barbara M. Judge, and I am over the age of 19 years. I am a Court clerk, III for the Circuit Court of Baldwin County, Alabama. I have personal knowledge of the facts contained in this Affidavit.

2. I personally made the unsigned, handwritten entries of the case action summary sheet in Nelson v. Lapeyrouse Grain Corporation, Case Number CV-83-500016. On the last page of the case action summary sheet is an entry which reads, "Order granting motion for a new trial." Beside that entry is the date 11/5/84. I made that entry on the case action summary sheet on November 8, 1984, which was the date the Register of the Circuit Court of Baldwin County received Judge Claud D. Neilson's Order Granting Motion for New Trial which stated it was signed on November 5, 1984. I entered that Order on the case action summary sheet on November 8, 1984. The date of November 5, 1984, was the date the Judge signed the Order but the Order was not filed with the Register and entered on the case action summary sheet until November 8, 1984. Judge Neilson did not make the entry on the case action summary sheet which reads, "Order granting motion for new trial", because that was the entry that I made on November 8, when I entered his November 5 Order. Further-

more, Judge Claud D. Neilson did not call me on November 5, 1984, directing an entry of an Order for new trial. The first notice that I had of the grant of a new trial was when the Registers' Office received the Order granting new trial on November 8, 1984.

I have read the above and foregoing Affidavit of two pages and I certify that the facts contained therein are true and correct.

/s/ Barbara M. Judge

Sworn to and subscribed before me on this the 2nd day of October, 1985.

/s/ Clara H. Smith
NOTARY PUBLIC
MY COMMISSION EXPIRES:
9/6/89

§ 12-22-10. *Grant or refusal of motion for new trial.*

Either party in a civil case, or the defendant in a criminal case, may appeal to the appropriate appellate court from an order granting or refusing a motion for a new trial by the circuit court. (Code 1896, § 434; Code 1907, § 2846; Acts 1915, No. 656, p. (722; Code 1923, § 6088; Code 1940, T. 7, § 764; Acts 1949, No. 57, p. 81.)

IN THE SUPREME COURT
OF ALABAMA

CASE NO. .....

CIVIL ACTION NO. CV-83-500016

EX PARTE, FLORA JANE NELSON, doing business as W. J. NELSON COMPANY,

Petitioner

RE: FLORA JANE NELSON, doing business as W. J. NELSON COMPANY,

Plaintiff

Vs.

LAPEYROUSE GRAIN CORPORATION, LAPEYROUSE GRAIN CORPORATION OF ALABAMA, et al.,

Defendants.

PETITION FOR WRIT OF MANDAMUS

Comes now Flora Jane Nelson, doing business as W. J. Nelson Company, and petitions the above-named Court for Writ of Mandamus to the Honorable Claude D. Neilson,[1] of the Circuit Court of Baldwin County, Alabama, and shows the following in support of this petition:

I

STATEMENT OF FACTS

This action was commenced on or about the 27th day of January, 1983, by the filing of a complaint by Flora Jane Nelson, doing business as W. J. Nelson Company

---

[1]The Circuit Judges for Baldwin County had previously recused themselves and Honorable Claude D. Neilson was appointed as presiding judge in this case on May 23, 1983.

against the Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama, and various fictitious parties. In Plaintiff's complaint, Plaintiff sought damages against the Defendants for, *inter alia,* breach of fiduciary duty, and Plaintiff sought an accounting of certain disputed items concerning a running account between merchants. A copy of Plaintiff's complaint is attached hereto as Exhibit "A". Subsequent to the filing of the original complaint, Plaintiff amended her complaint to add additional counts setting forth, *inter alia,* a cause of action against the Defendants for conversion. A copy of the amended complaint is attached hereto as Exhibit "B". Prior to the filing of the amended complaint, this case went before this Court on Petition for Writ of Mandamus seeking this Court to issue an order commanding the Circuit Judge to vacate an order he had entered transferring this case to Mobile, Alabama. *See Flora Jane Nelson, etc. vs. Lapeyrouse Grain Corporation,* 448 So.2d 339 (Ala. 1984). The Defendants filed answers to Plaintiff's complaint and amended complaint and Plaintiff filed Answers to Defendants' Counterclaim. Exhibits "C", "D", "E", and "F".

On or about July 26, 1984, this case came to trial in the Circuit Court of Baldwin County, Alabama. The Honorable Claude D. Neilson heard the case. (See footnote 1) The case was tried by jury and on July 30, 1984, the jury returned a verdict in favor of the Plaintiff and against the Defendants on Plaintiff's complaint and assessed Plaintiff's damages at Five Hundred Sixty-One Thousand Five Hundred Thirty-Seven and 47/100 ($561,537.47) DOLLARS. Exhibit "G" The jury also found in favor of the Plaintiff against the Defendants on Defendants' counterclaim. Exhibit "G". Judgment was filed with the

Circuit Court of Baldwin County, Alabama, on August 9, 1984. Exhibit "G". On August 8, 1984, Defendants filed post trial Motions for Judgment not Withstanding the Verdict and Motion for New Trial. Exhibit "H" and Exhibit "I". The trial court did not file or enter an order on Defendants' post trial motions by November 6, 1984, which was the ninetieth day after the filing of Defendants' post trial motions. The trial court did draft and sign an order granting a Motion for New Trial which was dated November 5, 1984, but this motion was not filed with the Circuit Clerk of Baldwin County until November 8, 1984. Exhibit "J". On December 14, 1984, the trial court entered a corrected order granting Defendants' Motion for New Trial which was dated December 7, 1984. Exhibit "K"

On December 13, 1984, Plaintiff filed a Notice of Appeal to the Supreme Court of Alabama from the orders of the trial court which attempted to grant Defendants' Motion for New Trial after the expiration of the ninety day period provided for in Rule 59.1 of the *Alabama Rules of Civil Procedure*. Exhibit "L" The case is docketed with this court as Case No. 84-294. On December 26, 1984, Defendants filed a Notice of Cross Appeal to the Supreme Court of Alabama from the trial court's denial of Defendants' Motion for Judgment not Withstanding the Verdict with respect to the complaint and with respect to the counterclaim, specifically stating that those denials occurred as a matter of law on November 6, 1984, due to the operation of law.

The Plaintiff has filed contemporaneously with this Petition for Writ of Mandamus, a Motion to Consolidate

for hearing and adjudication this Petition for Writ of Mandamus with the appeal and cross appeal filed by the parties in this case so the court will have before it the entire record of the proceedings that took place in the trial court.

II

THE ISSUE PRESENTED

The sole issue presented in this Petition for Writ of Mandamus is whether the trial court's order granting Defendants' Motion for New Trial which was filed on November 8, 1984, and the subsequent corrected order filed on December 14, 1984, are void as a matter of law due to the operation of Rule 59.1 of the *Alabama Rules of Civil Procedure* or due to the fact Defendants' post trial motions were filed prior to the entry of judgment.

III

RELIEF SOUGHT

Petitioner respectfully requests this Honorable Court to issue a Writ of Mandamus commanding the Honorable Claude D. Neilson, who for this case is the Presiding Judge of the Circuit Court of Baldwin County, Alabama, to vacate his orders granting Defendants' Motion for New Trial, and to further order that the judgment in favor of the Plaintiff and against Defendants in the amount of Five Hundred Sixty-One Thousand Five Hundred Thirty-Seven and 47/100 ($561,537.47) DOLLARS (which was the verdict returned by the jury in the trial of this case) be reinstated and re-entered for all purposes, including the purpose of execution.

IV

REASONS WHY THE WRIT SHOULD ISSUE

The reason this Court should issue the Writ of Mandamus requested by the Plaintiff/Petitioner is the simple reason that the trial court lost jurisdiction to grant Defendants' Motion for New Trial on November 6, 1984, due to the operation of Rule 59.1 of the *Alabama Rules of Civil Procedure*. Rule 59.1 of the *Alabama Rules of Civil Procedure* states in pertinent part that:

> "No post-trial motion filed pursuant to Rules 50, 52, or 59 shall remain pending in the trial court for more than 90 days, unless with the express consent of all the parties, which consent shall appear of record, or unless extended by the appellate court to which an appeal of the judgment would lie, and such time may be further extended for good cause shown. *A failure by the trial court to dispose of any pending post-trial motion within the time permitted hereunder, or any extension thereof, shall constitute a denial of such motion as of the date of the expiration of the period.*" (Emphasis supplied)

In this case the jury returned a verdict in favor of the Plaintiff for Five Hundred Sixty-One Thousand Five Hundred Thirty-Seven and 47/100 ($561,537.47) DOLLARS on July 30, 1984. Exhibit "G" The trial court did not enter an order based upon the jury's verdict until August 9, 1984. Under Rule 4 of the *Alabama Rules of Appellate Procedure*, the filing of a post-trial motion pursuant to ARCP Rule 59 will stay the running of the forty-two (42) day period for filing a notice of appeal; however, Rule 59.1 of the *Alabama Rules of Civil Procedure* states that the motion is automatically denied at the expiration of ninety (90) days. Under the facts of this case, Defend-

ants' post trial motions were automatically denied by operation of law on November 6, 1984, which was the ninetieth day from the date of the filing of the post trial motions. Defendants admit this in their Notice of Cross-Appeal which states that their Motions for Judgment Notwithstanding the Verdict were denied as a matter of law on November 6, 1984. Exhibit "M"

Under Alabama law, the trial court has no jurisdiction to enter an order pursuant to Rule 59, *Alabama Rules of Civil Procedure,* where more than ninety (90) days have passed from the time of the parties post-trial motion for new trial or rehearing and where such motion has not been ruled upon in the time during which such motion could remain pending and the time period has not been extended. *French v. Steel, Inc.,* 445 So.2d 561 (Ala.1984); *Thompson v. Keith,* 365 So.2d 971 (Ala.1978); *McKinley v. Colonial Life & Accident Ins. Co.,* 410 So.2d 73 (Ala.Civ.Appeals 1982); *Carnes v. Carnes,* 365 So.2d 981 (Ala.Civ.Appeals 1978), cert. denied, 365 So.2d 985 (Ala.1979). A post-trial motion is pending as of its filing and until acted upon by the court and the ninety (90) day period begins to run from the date of filing. *State v. Wall,* 348 So.2d 482 (Ala. 1977).

In this case the Defendants' post-trial motions were clearly denied by operation of law on November 6, 1984, which was ninety days from the date the post-trial motions were filed with the Circuit Court. Indeed, Defendants in their own Notice of Cross-Appeal to this court have admitted that November 6, 1984, was the day the post-trial motions were deemed denied by operation of law. Exhibit "M"

It is anticipated that Defendants may argue that since the trial court's order states it was signed on November 5, 1984, the Rule 59.1 time period does not apply. If this argument is made it is totally without merit since the record clearly shows that the trial court's order was not filed until November 8, 1984; thus, the order was not effective until November 8, 1984, which was more than ninety (90) days after the filing of the post-trial motion.

Under Alabama law, a separate written judgment must be filed before that judgment can become effective. Rule 58, ARCP; *Lacks v. Stribling,* 406 So.2d 926 (Ala. 1981); *Holmes v. Powell,* 363 So.2d 760 (Ala.1978). This court held in *Lacks v. Stribling,* supra, as follows, to-wit:

> "A separate judgment may be signed by the trial judge, but it is not effective until he authorizes that it be filed with the clerk or register, even if the filing date is several days, weeks, or even months later than the date reflected on a judgment. When a separate judgment is filed, the filing thereof constitutes the entry of judgment and would take preference over an additional attempted entry thereof by the clerk or register by any other method of entering authorized by Rule 58(c). To hold as contended by *Lacks,* supra, would mean that if adequate time differed between the date of entry by the Clerk on the case action summary and the date of the filing of the separate judgment, the Clerk could effectively eliminate a motion for new trial (if the difference was more than thirty days), or even an appeal (if the difference was more than forty-two days) such construction is contrary to the spirit of modern judicial philosophy. (citation omitted)
>
> We determined that the judgment dated July 2 was entered when it was filed by the register on July 9, that such entry prevails and we are not governed in this matter by the actions of the register in placing

> the July 2 date and "Order of the Court" on the case action summary, and the Stribling motion of August 8 was timely filed." 406 So.2d at 930

From reading the preceding excerpt from *Lacks v. Stribling,* supra, it is clear that a separate written order of the Court is not effective until that order is filed with the clerk or register. The date that appears on the order is not controlling but the actual filing of the judgment constitutes the date when the judgment becomes effective and is controlling and is the date from which time periods are calculated. The court in *Lacks v. Stribling,* supra, held that it does not matter if the date on the order is several weeks prior to the filing date, the date for computation of time periods under the *Alabama Rules of Civil Procedure* will be the date the order is filed and this is true even if the docket sheet entry shows a different date.

The filing of a judgment or order in the office of the clerk constitutes the entry of the judgment for purposes of computing time periods under the rules. *See* e.g., *Holmes v. Powell,* supra. In this case the record clearly shows that the trial court's first order granting Defendants a new trial was not filed with the register until November 8, 1984. This is shown by the filing stamp which appears on the order granting Defendants' Motion for New Trial. Thus, the order granting Defendants' Motion for New Trial is void due to the fact that the ninety day time period under Rule 59.1 had expired and Defendants' Motion for New Trial was automatically denied on November 6, 1984. Similarly, the trial court's corrected order which was filed on December 14, 1984, was clearly past the ninety day time period and void and of no effect.

It is totally clear from the record in this case that the trial court's orders in this case granting Defendants a new trial are void and that the trial court lost all jurisdiction to grant a new trial by allowing the ninety day time period under Rule 59.1, APCP, to expire. The cases in Alabama have uniformly held that the ninety day time period provided for in Rule 59.1 is a jurisdictional requirement and if such time period expires the trial court is without power to grant relief pursuant to a post-trial motion for a new trial or motion for JNOV. Alabama law is also clear that the date which appears on a written order of the trial court is not controlling for the purpose of computing time periods but that the date of filing is controlling. *See* e.g., *Lacks v. Stribling,* supra.

The trial court's orders granting Defendants' Motion for New Trial are also void because Defendants post-trial motions for new trial were not timely or properly filed with the Court pursuant to Rule 59, ARCP.

Rule 59(b), ARCP provides:

> "(b) *Time for Motion.* A motion for a new trial shall be filed not later than 30 days *after the entry of judgment.*" (emphasis supplied)

Rule 59(d), ARCP provides:

> "(d) *On initiative of court.* Not later *than 30 days after entry of judgment* the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor." (emphasis supplied)

In this case, Defendants filed their post-trial motions prior to the entry of judgment and *not after* the entry of the judgment. Thus, a motion for new trial was not timely

or properly filed and a motion for new trial was never properly before the trial court. Furthermore, the trial court's order granting Defendants a new trial was entered more than thirty days after the entry of judgment; thus, the court was without jurisdiction to grant a new trial since a motion for new trial was not properly filed.

For these reasons, the Petitioner respectfully requests that this Court issue the Writ of Mandamus vacating the trial court's orders granting the Defendants a new trial, and further requiring the Court to reinstate the judgment it entered on July 30, 1984, which was based upon the jury's verdict in this case.

V

The following documents are enclosed or attached which are essential to an understanding of the matters set forth above:

Exhibit "A" — Complaint

Exhibit "B" — Amended Complaint

Exhibit "C" — Answer to Complaint

Exhibit "D" — Answer to Amended Complaint

Exhibit "E" — Answer to Counterclaim

Exhibit "F" — Amended Answer to Counterclaim

Exhibit "G" — Judgment

Exhibit "H" — Docket Sheet

Exhibit "I" — Post Trial Motions

Exhibit "J" — Order Granting New Trial

Exhibit "K" — Corrected Order

Exhibit "L" — Notice of Appeal

Exhibit "M" — Notice of Cross-Appeal

Petitioner would also refer the trial court to the record on appeal in Case No. 84-294, styled *"Flora Jane Nelson, etc., Appellant, vs. Lapeyrouse Grain Corporation, et al., Appellees"*.

WHEREFORE, THE PREMISES CONSIDERED, Petitioner prays that the Court grant the petition and order that an answer to the petition be filed by the Respondents.

I certify that I have this day served copies of this petition on the Respondent Judge and all other parties to the action in the trial court.

Respectfully submitted,

/s/ Roger S. Morrow
/s/ Robert M. Alton, Jr.

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the above and foregoing Petition on the following, by mailing same postage prepaid to their respective offices:

Hon. Claude D. Neilson
Presiding Circuit Judge
P. O. Box 489
Demopolis, Alabama 36732

Hon. Caine O'Rear
Attorney at Law
P. O. Box 123
Mobile, Alabama 36601
(205) 433-5511

HON. CHARLES C. PARTIN
Attorney at Law
P. O. Box 1109
Bay Minette, Alabama 36507

This the 28th day of January, 1985.

/s/ ROGER S. MORROW
OF COUNSEL

IN THE SUPREME COURT
OF ALABAMA

ON APPEAL SUPREME COURT

CASE NO. 84-294

FLORA JANE NELSON, d/b/a
W. J. NELSON COMPANY,

Appellant,

vs.

LAPEYROUSE GRAIN CORPORATION and
LAPEYROUSE GRAIN CORPORATION OF
ALABAMA, et al.,

Appellee.

ON CROSS-APPEAL SUPREME COURT

CASE NO. 84-342

LAPEYROUSE GRAIN CORPORATION,

Appellant,

vs.

FLORA JANE NELSON, d/b/a
W. J. NELSON COMPANY,

Appellee.

CASE NO. ———

CIVIL ACTION NO. CV-83-500016

EX PARTE, FLORA JANE NELSON, doing business as W. J. NELSON COMPANY,

Plaintiff, Petitioner,

RE: FLORA JANE NELSON, doing business as W. J. NELSON COMPANY,

vs.

LAPEYROUSE GRAIN CORPORATION, LAPEYROUSE GRAIN CORPORATION OF ALABAMA, et al.,

Defendants.

MOTION TO CONSOLIDATE

(Filed January 28, 1985)

Comes now Appellant/Petitioner, Flora Jane Nelson, doing business as W. J. Nelson Company, by and through her undersigned counsel, and moves this Honorable Court to consolidate for purposes of hearing and adjudication Flora Jane Nelson's Petition for Mandamus with the above-styled appeal bearing Supreme Court Case No. 84-294, and the above-styled cross-appeal filed by Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama, bearing Supreme Court Case No. 84-342. Appellant/Petitioner sets forth the following grounds in support of this Motion, to-wit:

1. That all issues involved in the Petition for Writ of Mandamus, the appeal and the cross-appeal are interrelated and involve the same transactions and case;

2. That the record which has been filed or will be filed in Case Nos. 84-294 and 84-342 contain the same

transcripts, pleadings, motions, and other documents that will be helpful in ruling on the Petition for Writ of Mandamus;

3. That some of the issues involved in all three proceedings before this Court are identical or similar.

WHEREFORE, THESE PREMISES CONSIDERED, Appellant/Petitioner, Flora Jane Nelson, respectfully requests this Honorable Court to consolidate all three cases for adjudication and hearing.

/s/ ROGER S. MORROW

OF COUNSEL:
WHITESELL, MORROW & ROMINE, P.C.
P. O. Box 2450
Montgomery, Alabama 36103-2450
(205) 262-1967

/s/ ROBERT M. ALTON, JR.

Attorneys for Petitioner

OF COUNSEL:
302 Corporate Square
555 South Perry Street
Montgomery, Alabama 36104
(205) 834-8661

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the above and foregoing Petition on the following, by mailing same postage prepaid to their respective offices:

HON. CLAUDE D. NEILSON
Presiding Circuit Judge
P. O. Box 489
Demopolis, Alabama 36732

HON. CAINE O'REAR
Attorney at Law
P. O. Box 123
Mobile, Alabama 36601
(205) 433-5511

Hon. Charles C. Partin
Attorney at Law
P. O. Box 1109
Bay Minette, Alabama 36507

This the 28th day of January, 1985.

/s/ Roger S. Morrow
OF COUNSEL

IN THE SUPREME COURT OF ALABAMA

SUPREME COURT CASE NO. 84-342

LAPEYROUSE GRAIN CORPORATION, and LAPEYROUSE GRAIN CORPORATION OF AMERICA,

Cross-Appellants,

vs.

FLORA JANE NELSON, d/b/a W. J. NELSON COMPANY,

Cross-Appellee.

MOTION TO DISMISS CROSS-APPEAL OF DEFENDANTS/APPELLEES LAPEYROUSE GRAIN CORPORATION AND LAPEYROUSE GRAIN CORPORATION OF ALABAMA

(Filed January 28, 1985)

Comes now Cross-Appellee, Flora Jane Nelson, doing business as W. J. Nelson Company, by and through her undersigned counsel, and moves this Honorable Court to dismiss the Cross-Appeal of Cross-Appellants, Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama, on the following grounds, to-wit:

1. Said appeal was filed more than forty-two (42) days after November 6, 1984, which was the date that Cross-Appellants' post-trial motions were denied as a matter of law pursuant to Rule 59.1 of the *Alabama Rules of Civil Procedure;*

2. That although Cross-Appellants filed their notice of cross-appeal within fourteen (14) days of the date Flora Jane Nelson filed her notice of appeal, ARAP Rule 4(a)2 does not operate to make the filing of Cross-Appel-

lant's notice of appeal timely because Flora Jane Nelson's appeal was taken from a void order granting a motion for new trial;

3. That the trial court's order granting a new trial to Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama is void due to the operation of Rule 59.1, ARCP;

4. That the Cross-Appeal of Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama was not timely filed therefore the Supreme Court of Alabama has no jurisdiction to entertain the Cross-Appeal.

5. That the notice of cross appeal was not timely filed due to the fact that the post trial motions filed by Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama were filed prior to the entry of judgment and therefore did not suspend the forty-two (42) day time period for filing a Notice of Appeal.

WHEREFORE, THESE PREMISES CONSIDERED, Cross-Appellee, Flora Jane Nelson, respectfully requests this Honorable Court to dismiss the Cross-Appeal filed by Cross-Appellants, Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama.

/s/ Roger S. Morrow

OF COUNSEL:
Whitesell, Morrow & Romine, P.C.
P. O. Box 2450
Montgomery, Alabama 36103-2450
(205) 262-1967

/s/ Robert M. Alton, Jr.

Attorneys for Petitioner

OF COUNSEL:
302 Corporate Square
555 South Perry Street
Montgomery, Alabama 36104
(205) 834-8661

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the above and foregoing Petition on the following, by mailing same postage prepaid to their respective offices:

HON. CAINE O'REAR
Attorney at Law
P. O. Box 123
Mobile, Alabama 36601
(205) 433-5511

HON. CHARLES C. PARTIN
Attorney at Law
P. O. Box 1109
Bay Minette, Alabama 36507

This the 28th day of January, 1985.

/s/ ROGER S. MORROW
OF COUNSEL

September 30, 1985

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA
84-424

EX PARTE: FLORA JANE NELSON, d/b/a W. J. NELSON COMPANY

PETITION FOR WRIT OF MANDAMUS

(In Re: Flora Jane Nelson, d/b/a W. J. Nelson Company v. Lapeyrouse Grain Corporation, Lapeyrouse Grain Corporation of Alabama, et al.)

IT IS ORDERED, ex mero motu, that this cause be placed on rehearing.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court. Witness my hand this 30th day of September, 1985.

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

IN THE SUPREME COURT
OF THE STATE OF ALABAMA

SUPREME COURT CASE NO: 85-393

LAPEYROUSE GRAIN CORPORATION and
LAPEYROUSE GRAIN CORPORATION
OF ALABAMA,

Appellants/Defendants,

vs.

FLORA JANE NELSON d/b/a
W. J. NELSON COMPANY,

Appellee/Plaintiff.

MOTION TO DISMISS APPEAL OF APPELLANTS,
LAPEYROUSE GRAIN CORPORATION AND
LAPEYROUSE GRAIN CORPORATION
OF ALABAMA

(Filed January 17, 1986)

Comes now the Appellee/Plaintiff, Flora Jane Nelson, individually and d/b/a W. J. Nelson Company, by and through her undersigned counsel, and moves this Honorable Court to dismiss the appeal and notice of appeal filed by Appellants, Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama, in the above styled case on the following grounds, to wit:

1. That Appellants'/Defendants' notice of appeal was filed more than 42-days after November 6, 1984, which was the date that Appellants' post trial motions were denied as a matter of law pursuant to Rule 59.1 of the *Alabama Rules of Civil Procedure.* A copy of the judgment of the Circuit Court is attached hereto as Exhibit "A". A copy of Appellees' notice of appeal is attached hereto as Exhibit "B".

2. That this Honorable Court has ruled as a matter of law that Appellants/Defendants, Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama, have waived their right of appeal of the judgment entered in this case. That this Court reached this decision in the cases of *Ex parte Floras Jane Nelson d/b/a W. J. Nelson Company,* Supreme Court Case Number 84-424, *Flora Jane Nelson d/b/a W. J. Nelson Company v. Lapeyrouse Grain Corporation, et al,* Supreme Court Case Number 84-294, and in *Lapeyrouse Grain Corporation v. Flora Jane Nelson d/b/a W. J. Nelson Company,* (October 11, 1986) Supreme Court Case Number 84-342. A copy of the relevant mandates of this Court are attached hereto as Exhibits "C", "D" and "E".

3. That in the case of *Ex parte: Flora Jane Nelson d/b/a W. J. Nelson Company,* Supreme Court Case Number 84-424, (October 11, 1986) this Honorable Court specifically held that the Appellants/Defendants Lapeyrouse had failed to file a timely notice of appeal within 42 days of the Rule 59.1 denial of their post trial motions and therefore dismissed Defendants' appeal (which was a cross appeal) in case number 84-342, styled *Lapeyrouse Grain Corporation v. Nelson.* In that opinion this Court specifically held that Defendants, Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama, had filed their notice of appeal beyond 42 days from November 6, 1984, and that their appeal was therefore due to be dismissed on jurisdictional grounds. A copy of this Court's opinion in Supreme Court Case Number 84-424 is attached hereto as Exhibit "F".

4. That in *Ex parte Flora Jane Nelson d/b/a W. J. Nelson Company,* Supreme Court Case Number 84-424, this

Court issued a mandate ordering Honorable Claud D. Neilson, Circuit Judge, to enter an Order setting aside his void Order dated November 5, 1984, which granted a motion for new trial in the case of *Flora Jane Nelson d/b/a W. J. Nelson Company v. Lapeyrouse Grain Corporation, Lapeyrouse Grain Corporation of Alabama, et al,* Baldwin Circuit Court case number CV-83-500016. A copy of that mandate is attached hereto as Exhibit "C".

5. That pursuant to the mandate of this Court, Judge Claud D. Neilson entered an Order on December 16, 1985, (dated December 12, 1985) setting aside the void Order dated November 5, 1984. A copy of said Order is attached hereto as Exhibit "G".

6. That Appellants'/Defendants' notice of appeal is from the Order of Judge Claud D. Neilson entered on December 16, 1985, dated December 12, 1985, which was entered pursuant to this Court's Order.

7. That the December 12, 1985, Order of Judge Claud D. Neilson does not support an appeal in this case. A copy of said Order is attached hereto as Exhibit "G".

8. That the appeal filed by Appellants/Defendants is a blatantly frivolous appeal which attempts to appeal an issue already decided by this Court; namely, whether the Defendants, Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama can appeal the judgment entered in this case after the 42 day jurisdictional time period for the filing of a notice of appeal has expired.

9. That the notice of appeal in this case was filed more than 42 days after November 6, 1984, which was the date that the Appellants' post trial motions were denied as a matter of law pursuant to Rule 59.1 of the *Alabama*

Rules of Civil Procedure; therefore, Appellants' notice of appeal was not timely filed and the Supreme Court of Alabama thus has no jurisdiction to entertain the appeal.

10. That Appellants' notice of appeal should be dismissed on the grounds of *res judicata* and/or collateral estoppel in that this Court has already decided as a matter of law that Appellants' notice of appeal was not timely filed and thus Appellants are precluded from appealing the judgment entered in this case or any of the Orders listed in Appellants' notice of appeal.

11. That this Court should immediately dismiss the appeal filed by the Appellants in this case in that the Appellants, Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama, have not filed a timely notice of appeal; therefore, the Supreme Court of Alabama does not have jurisdiction to entertain this appeal.

12. That Appellants/Defendants, Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama, filed a supersedeas bond with this appeal which has the effect of staying execution by the Plaintiff on the judgment. That this stay of execution may cause irreparable harm to the Appellee/Plaintiff since the amount of supersedeas bond is $701,921.84 (125% of the original judgment) and since the amount of judgment, including accrued interest plus penalty, now approximately equals or exceeds $701,921.84 due to the length of time that has expired since the original entry of judgment. Furthermore, Appellee had filed and served a writ of garnishment on Appellants' bank account prior to the filing of the supersedeas bond.

13. That since Appellants' appeal has already been dismissed, this appeal is totally frivolous.

14. That Appellee, Flora Jane Nelson, is entitled to damages for a frivolous appeal pursuant to Rule 38 of the *Alabama Rules of Appellate Procedure* which would include an award of a reasonable attorneys' fees.

15. That the Appellee, Flora Jane Nelson, is entitled to the 10% penalty provided by statute for an unsuccessful appeal when a supersedeas bond is posted.

WHEREFORE, THESE PREMISES CONSIDERED, Appellee/Plaintiff, Flora Jane Nelson, respectfully requests this Court for the following relief, to wit:

1. An Order dismissing the above styled appeal and notice of appeal filed by Appellants, Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama.

2. An award of damages for the filing of a frivolous appeal which would include an award to Appellee's attorneys of a reasonable attorneys' fee.

3. The imposition of the 10% penalty for an unsuccessful appeal as provided for by statute in cases where a supersedeas bond is filed.

4. An Order declaring the forfeiture of the Appellants' supersedeas bond in the event they do not immediately pay to Appellee the amount of the judgment, plus accrued interest, penalty, attorneys' fees and damages ordered by this Court.

5. Such other, further and additional relief to which Appellee/Plaintiff may be entitled, the premises considered.

/s/ Roger S. Morrow
Attorney for Appellee

OF COUNSEL:
WHITESELL, MORROW & ROMINE
P. O. Box 2450
Montgomery, Alabama 36103
Telephone: (205) 262-1967

/s/ Robert M. Alton, Jr.
Attorney for Appellee

OF COUNSEL:
302 Corporate Square
555 South Perry Street
Montgomery, Alabama 36104
Telephone: (205) 834-8661

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing upon Honorable Caine O'Rear, III, HAND, ARENDALL, BEDSOLE, GREAVES & JOHNSTON, P. O. Box 123, Mobile, Alabama, 36601, by placing a copy of the same in the United States mail, postage fully prepaid, on this the 17th day of January, 1986.

/s/ Roger S. Morrow
OF COUNSEL

B-33

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

FEBRUARY 28, 1986

BALDWIN CIRCUIT COURT CV-83-500016
85-393

LAPEYROUSE GRAIN CORPORATION
AND LAPEYROUSE GRAIN CORPORATION
OF ALABAMA

v.

FLORA JANE NELSON, d/b/a
W. J. NELSON COMPANY

ORDER

The appellants having filed an application for rehearing from the dismissal of the appeal in this cause, and the same having been submitted and duly considered by the Court,

IT IS ORDERED that the appellants' application for rehearing is overruled.

Torbert, C. J., and Maddox, Faulkner, Jones, Almon, Shores, Beatty, JJ., concur.

Adams and Houston, JJ., not sitting.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 28th day of Feb. 1986.

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

FEBRUARY 28, 1986

BALDWIN CIRCUIT COURT CV-83-500016

84-342

LAPEYROUSE GRAIN CORPORATION
AND LAPEYROUSE GRAIN CORPORATION
OF ALABAMA

v.

FLORA JANE NELSON, d/b/a
W. J. NELSON COMPANY

ORDER

Because, upon further consideration of this case, the Court is of the opinion that this appeal should not have been dismissed at the time the petition for writ of mandamus was granted in 84-424, *Ex parte Flora Jane Nelson d/b/a W. J. Nelson Company* (*In re*: *Flora Jane Nelson d/b/a W. J. Nelson Company v. Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama*),

IT IS ORDERED, *ex mero motu,* that the appeal in 84-342 filed by Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama be reinstated, and the Clerk of the Circuit Court of Baldwin County is directed to return forthwith to this Court the certificate of judgment issued in this cause on December 10, 1985.

IT IS FURTHER ORDERED that the Reporter of Decisions of this Court withhold from final publication the opinion of this Court in 84-424, *Ex parte Flora Jane Nelson Company,* pending the further orders of this Court.

IT IS FURTHER ORDERED that the time for Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama to file their appellants' brief in 84-342 shall commence on March 3, 1986, and the time for filing and serving briefs shall be governed by Rule 31(a), Alabama Rules of Appellate Procedure.

Torbert, C. J., and Maddox, Faulkner, Jones, Almon, Shores, Beatty, JJ., concur.

Adams and Houston, J., not sitting.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 28th day of Feb. 1986.

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

B-36

IN THE SUPREME COURT OF ALABAMA

MARCH 5, 1986

BALDWIN CIRCUIT COURT CV-83-500016

84-294

FLORA JANE NELSON, d/b/a
W. J. NELSON COMPANY

v.

LAPEYROUSE GRAIN CORPORATION
AND LAPEYROUSE GRAIN CORPORATION
OF ALABAMA

ORDER

Because, upon further consideration of this case, the Court is of the opinion that this appeal should not have been dismissed at the time the petition for writ of mandamus was granted in 84-424, *Ex parte Flora Jane Nelson d/b/a W. J. Nelson Company* (*In re*: *Flora Jane Nelson d/b/a W. J. Nelson Company v. Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama*),

IT IS ORDERED, *ex mero motu,* that the appeal in 84-294 filed by Flora Jane Nelson d/b/a W. J. Nelson Company be reinstated, and the Clerk of the Circuit Court of Baldwin County is directed to return forthwith to this Court the certificate of judgment issued in this cause on December 10, 1985.

IT IS FURTHER ORDERED that the Reporter of Decisions of this Court withhold from final publication the opinion of this Court in 84-424, *Ex parte Flora Jane Nelson d/b/a W. J. Nelson Company,* pending the further orders of this Court.

IT IS FURTHER ORDERED that the position of Flora Jane Nelson d/b/a W. J. Nelson Company will be

that of a cross-appellant, and an appellee's/cross-appellant's brief should be filed within twenty-one (21) days of service of the appellants' brief, i.e. Lapeyrouse Grain Corporation's and Lapeyrouse Grain Corporation of Alabama's brief in 84-342.

Torbert, C. J., and Maddox, Faulkner, Jones, Almon, Shores, and Beatty, JJ., concur.

Adams and Houston, JJ., not sitting.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 6th day of Mar. 1986.

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

MARCH 6, 1986

BALDWIN CIRCUIT COURT CV-83-500016

84-294

FLORA JANE NELSON, d/b/a
W. J. NELSON COMPANY

v.

LAPEYROUSE GRAIN CORPORATION
AND LAPEYROUSE GRAIN CORPORATION
OF ALABAMA

BALDWIN CIRCUIT COURT CV-83-500016

84-342

LAPEYROUSE GRAIN CORPORATION
AND LAPEYROUSE GRAIN CORPORATION
OF ALABAMA

v.

FLORA JANE NELSON, d/b/a
W. J. NELSON COMPANY

84-424

EX PARTE FLORA JANE NELSON d/b/a
W. J. NELSON COMPANY

PETITION FOR WRIT OF MANDAMUS
(IN RE: FLORA JANE NELSON, d/b/a W. J. NELSON COMPANY V. LAPEYROUSE GRAIN CORPORATION AND LAPEYROUSE GRAIN CORPORATION OF ALABAMA)

B-39

BALDWIN CIRCUIT COURT CV-83-500016

85-393

LAPEYROUSE GRAIN CORPORATION
AND LAPEYROUSE GRAIN CORPORATION
OF ALABAMA

v.

FLORA JANE NELSON, d/b/a
W. J. NELSON COMPANY

ORDER

This Court having considered its prior orders in these cases, and finding it necessary to clarify the orders,

IT IS ORDERED as follows:

1. That the opinion in 84-424 is temporarily withdrawn from final publication, but that this Court's decision that the motion for new trial was overruled by operation of law remains unaffected; and

2. That the position of Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama will be that of appellants, and they may brief the arguments, for example, that they were entitled to judgment notwithstanding the verdict or a new trial although an issue will be whether Lapeyrouse Grain Corporation's and Lapeyrouse Grain Corporation of Alabama's notice of appeal limits them to arguing only the judgment notwithstanding the verdict issue; and

3. That execution on the judgment in CV-83-500016 is stayed for a period of seven (7) days from the date of this order in order to allow Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama the opportunity to file in the trial court a supersedeas bond.

Torbert, C. J., Maddox, Jones, Shores, and Adams, JJ., concur.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 6th day of Mar. 1986.

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

IN THE SUPREME COURT OF ALABAMA

SUPREME COURT CASE NO. 84-342

BALDWIN COUNTY CIRCUIT
COURT NO. CV-83-50016

LAPEYROUSE GRAIN CORPORATION, and LAPEYROUSE GRAIN CORPORATION OF ALABAMA,

Appellants,

vs.

FLORA JANE NELSON, d/b/a
W. J. NELSON COMPANY,

Appellee.

APPLICATION FOR REHEARING

(Filed March 13, 1986)

Comes now Appellee/Plaintiff, Flora Jane Nelson, individually and d/b/a W. J. Nelson Company, and files this application for rehearing from the order of this Court issued on February 28, 1986, and the amended Order of March 6, 1986, and moves this Honorable Court to grant a rehearing concerning said Orders and to further withdraw and vacate said Orders. As grounds for this motion, the movant shows the Court as follows:

1.) The Court did not have jurisdiction to issue the Order of February 28, 1986, which reinstated the appeal of Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama (hereinafter referred to as Lapeyrouse).

2.) That the certificate of judgment issued on December 10, 1985, in the above styled appeal was a final

judgment and this Court did not have jurisdiction or authority to amend or withdraw that certificate of judgment on February 28, 1986.

3.) That principles of finality, res judicata and collateral estoppel prevent this Court from withdrawing its Order of December 10, 1985, causing a relitigation of the issues presented in that appeal.

4.) That this Court is without authority or jurisdiction to rescind or withdraw its Order of December 10, 1985, which finally dismissed the above styled appeal due to the fact that Lapeyrouse had timely filed an application for rehearing which addressed the dismissal of their appeal and due to the fact that this Court rejected the arguments of the Defendants and entered a final judgment of dismissal on December 10, 1985.

5.) That this Court is without authority and without jurisdiction to amend, modify, vacate or rescind its final judgment of December 10, 1985, dismissing the above styled appeal on the ground that more than thirty days had elapsed since the entry of a final judgment of dismissal of the appeal, therefore ARCP Rule 59 bars the Court from modifying its order *ex mero motu.*

6.) That this Court is without authority or jurisdiction to vacate, rescind or withdraw its judgment of December 10, 1985, in that said judgment dismissing the appeal on December 10, 1985, became a final judgment after the allowance of an application for rehearing and that Rule 40 of the Alabama Rules of Appellate Procedure specifically prohibits this Court from granting a second application for rehearing in a case. The effect of this

Court's Order of February 28, 1986, was the allowance of a second application for rehearing through the subterfuge of a brief filed in the case styled *Lapeyrouse Grain Corporation, et al., v. Flora Jane Nelson,* Supreme Court Case No. 85-393. That this Court committed error in reversing its earlier decision dismissing the above styled appeal and that the reasoning originally contained in this Court's opinion issued on October 11, 1985, and affirmed on November 22, 1985, in Case No. 84-424 was correct.

7.) That the above styled appeal should be dismissed and was correctly dismissed by this Court due to the fact that the notice of appeal was filed after the lapse of the forty-two (42) day period for filing the appeal, therefore this Court has no jurisdiction to entertain the appeal.

8.) That this Court's Order of February 28, 1986, constitutes a violation of the rights guaranteed to Plaintiff/Appellee under the Fifth and Fourteenth Amendments (equal protection clause and/or due process clause) to the Constitution of the United States of America; Article 1, Sections 1, 10 and 13, Constitution of Alabama, 1901; Amendment No. 328, Article 6, Section 6.01 and/or 6.02, Constitution of Alabama, 1901 (as amended), and/or Section 12-2-7, Code of Alabama, 1975.

9.) That the operation and/or effect of this Court's Order of February 28, 1986, reversing an earlier final decision of this Court and reinstating Defendants' appeal operates as a denial of due process of law and equal protection under the law due to the fact that said reinstatement violates prior opinions and decisions of this Court and gives unequal treatment and advantage to Defendants

Lapeyrouse that have not been previously given other litigants under the laws of this state.

WHEREFORE, THE PREMISES CONSIDERED, Appellee/Plaintiff, Flora Jane Nelson, individually and d/b/a W. J. Nelson Company, respectfully requests this Honorable Court to grant her application for rehearing, to withdraw, rescind and vacate its Order of February 28, 1986, as later amended on March 6, 1986, and to enter an order finally dismissing the above styled appeal. Additionally, Appellee requests the Court to enter an Order staying any further additional briefs on the merits of the appeal in the above styled case until this Court has ruled on Plaintiff/Appellee's application for rehearing and motion to dismiss the above styled appeal.

/s/ Roger S. Morrow

OF COUNSEL

Whitesell, Morrow & Romine, P.C.
P. O. Box 2450
Montgomery, Alabama 36103-2450
205-262-1967

/s/ Robert M. Alton, Jr.

Attorneys for Plaintiff/Appellee

302 Corporate Square
555 South Perry Street
Montgomery, Alabama 36104
205-834-8661

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the above and foregoing document on the following, by mailing same postage prepaid to their respective offices:

Hon. Caine O'Rear
Attorney at Law
P. O. Box 123
Mobile, Alabama 36601

Hon. Charles C. Partin
Attorney at Law
P. O. Box 1109
Bay Minette, Alabama 36507

This the 13th day of March, 1986.

/s/ Roger S. Morrow
OF COUNSEL

IN THE SUPREME COURT OF ALABAMA

SUPREME COURT CASE NO. 84-342

BALDWIN COUNTY CIRCUIT COURT NO. CV-83-50016

LAPEYROUSE GRAIN CORPORATION, and LAPEYROUSE GRAIN CORPORATION OF ALABAMA,

Appellants,

vs.

FLORA JANE NELSON, d/b/a W. J. NELSON COMPANY,

Appellee.

MOTION TO DISMISS APPEAL OF APPELLANTS/DEFENDANTS, LAPEYROUSE GRAIN CORPORATION AND LAPEYROUSE GRAIN CORPORATION OF ALABAMA

(Filed March 13, 1986)

Comes now Appellee/Plaintiff, Flora Jane Nelson, individually and d/b/a W. J. Nelson Company, by and through the undersigned counsel, and moves this Honorable Court to dismiss the appeal and notice of appeal filed by the Appellants, Lapeyrouse Grain Corporation, and Lapeyrouse Grain Corporation of Alabama (hereinafter collectively designated as Lapeyrouse), in the above styled case on the following grounds, to-wit:

1.) Said appeal was filed more than forty-two (42) days after November 6, 1984, which was the date that Lapeyrouse's post-trial motions were denied as a matter of law pursuant to Rule 59.1 of the *Alabama Rules of Civil Procedure.*

2.) That although Lapeyrouse filed their notice of cross-appeal within fourteen (14) days of the date Flora

Jane Nelson filed her notice of appeal, ARAP Rule 4(a)(2) does not operate to make the filing of Cross-Appellant's notice of appeal timely because Flora Jane Nelson's appeal was taken from a void order granting a motion for new trial.

3.) That the trial court's order granting a new trial to Lapeyrouse is void due to the operation of Rule 59.1, ARCP.

4.) That the Cross-Appeal of Lapeyrouse was not timely filed; therefore the Supreme Court of Alabama has no jurisdiction to entertain the Cross-Appeal.

5.) The Court did not have jurisdiction to issue the Order of February 28, 1986, which reinstated the appeal of Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama (hereinafter referred to as Lapeyrouse).

6.) That the certificate of judgment issued on December 10, 1985, in the above styled appeal was a final judgment and this Court did not have jurisdiction or authority to amend or withdraw that certificate of judgment on February 28, 1986.

7.) That principles of finality, res judicata and collateral estoppel prevent this Court from withdrawing its Order of December 10, 1985, causing a relitigation of the issues presented in that appeal.

8.) That this Court is without authority or jurisdiction to rescind or withdraw its Order of December 10, 1985, which finally dismissed the above styled appeal due to the fact that Lapeyrouse had timely filed an applica-

tion for rehearing which addressed the dismissal of their appeal and due to the fact that this Court rejected the arguments of the Defendants and entered a final judgment of dismissal on December 10, 1985.

9.) That this Court is without authority and without jurisdiction to amend, modify, vacate or rescind its final judgment of December 10, 1985, dismissing the above styled appeal on the ground that more than thirty days had elapsed since the entry of a final judgment of dismissal of the appeal, therefore ARCP Rule 59 bars the Court from modifying its order *ex mero motu.*

10.) That this Court is without authority or jurisdiction to vacate, rescind or withdraw its judgment of December 10, 1985, in that said judgment dismissing the appeal on December 10, 1985, became a final judgment after the allowance of an application for rehearing and that Rule 40 of the Alabama Rules of Appellate Procedure specifically prohibits this Court from granting a second application for rehearing in a case. The effect of this Court's Order of February 28, 1986, was the allowance of a second application for rehearing through the subterfuge of a brief filed in the case styled *Lapeyrouse Grain Corporation, et al., v. Flora Jane Nelson,* Supreme Court Case No. 85-393. That this Court committed error in reversing its earlier decision dismissing the above styled appeal and that the reasoning originally contained in this Court's opinion issued on October 11, 1985, and affirmed on November 22, 1985, in Case No. 84-424 was correct.

11.) That the above styled appeal should be dismissed and was correctly dismissed by this Court due to the fact that the notice of appeal was filed after the lapse

of the 42-day period for filing the appeal, therefore this Court has no jurisdiction to entertain the appeal.

12.) That this Court's Order of February 28, 1986, constitutes a violation of the rights guaranteed to Plaintiff/Appellee under the Fifth and Fourteenth Amendments (equal protection clause and/or due process clause) to the Constitution of the United States of America; Article 1, Section 1, 10 and 13, Constitution of Alabama, 1901; Amendment No. 328, Article 6, Section 6.01 and/or 6.02, Constitution of Alabama, 1901 (as amended); and/or Section 12-2-7, Code of Alabama, 1975.

13.) That the operation and/or effect of this Court's Order of February 28, 1986, reversing an earlier final decision of this Court and reinstating Defendants' appeal operates as a denial of due process of law and equal protection under the law due to the fact that said reinstatement violates prior opinions and decisions of this Court and gives unequal treatment and advantage to Defendants Lapeyrouse that have not been previously given other litigants under the laws of this state.

WHEREFORE, THE PROMISES CONSIDERED, Appellee/Plaintiff, Flora Jane Nelson, individually and d/b/a W. J. Nelson Company, respectfully requests this Honorable Court to dismiss the above styled appeal and to tax all costs of this proceeding against the Defendants, Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama. Additionally, Plaintiff/Appellee requests this Court to enter an Order staying any further additional briefs on the merits of the appeal in the above styled case until this Court has ruled of Plaintiff/Appellee's application for rehearing and motion to dismiss the above styled appeal.

/s/ Roger S. Morrow

OF COUNSEL

Whitesell, Morrow & Romine, P.C.
P. O. Box 2450
Montgomery, Alabama 36103-2450
205-262-1967

/s/ Robert M. Alton, Jr.
Attorneys for Plaintiff/Appellee

302 Corporate Square
555 South Perry Street
Montgomery, Alabama 36104
205-834-8661

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the above and foregoing document on the following, by mailing same postage prepaid to their respective offices:

Hon. Caine O'Rear
Attorney at Law
P. O. Box 123
Mobile, Alabama 36601

Hon. Charles C. Partin
Attorney at Law
P. O. Box 1109
Bay Minette, Alabama 36507

This the 13 day of March, 1986.

/s/ Roger S. Morrow
OF COUNSEL

B-51

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

CASE NUMBER CV-85-500231

LAPEYROUSE GRAIN CORPORATION, and LAPEYROUSE GRAIN CORPORATION OF ALABAMA,

Plaintiffs

vs

FLORA JANE NELSON, individually and d/b/a W. J. NELSON COMPANY,

Defendant

ORDER

(Filed January 3, 1986)

This cause came before the Court on Petitioner Lapeyrouse's complaint, which included a prayer for temporary restraining order, and Respondent Nelson's Motion to Dismiss, and Motion to Dissolve the temporary restraining order. The TRO was granted on December 11, 1985, and a hearing set for December 20, 1985, at which time the court heard argument of counsel for both parties and extended the TRO until January 2, 1986, to allow the court adequate time to review the pleadings, exhibits, briefs and arguments of counsel.

Lapeyrouse's petition calls upon the court to grant it permanent relief from a judgment on four (4) basic grounds: first, that the judgment would have been set aside except for mistake, inadvertence, accident or excusable neglect on the part of the Judge, the court personnel, or both; second, that equity and good conscience so demand; third, that Lapeyrouse has good defense to Nelson's original claim and meritorious grounds for its counterclaim;

and fourth, that it has no adequate remedy at law. Additionally, the complaint asks for an injunction prohibiting execution on the judgment pending the outcome of this action.

The facts giving rise to this action are, briefly, as follows:

1. After a trial of the original issues between these parties a jury returned a verdict for the Plaintiff (Nelson) on both the complaint and the counterclaim.

2. Judgment was rendered on the verdict on July 30, 1984, by the Honorable Claude Neilson, Circuit Judge, who was specially assigned to try the case.

3. Defendant Lapeyrouse filed motions for J.N.O.V., and in the alternative, for new trial on August 8, 1984.

4. On November 5, 1984, Judge Neilson signed an order granting the Motion for New Trial, but that order was not filed until November 8, 1984.

5. Nelson filed an appeal of the order of November 5, 1984, and later a Petition for Writ of Mandamus asking that Judge Neilson be required to withdraw that order.

6. Lapeyrouse filed a cross appeal of the denial of its Motion for J.N.O.V.

7. On October 11, 1985, the Supreme Court issued its order mandating that Judge Neilson's order of November 5, 1984, be vacated.

8. Lapeyrouse filed an application for rehearing which was overruled on November 22, 1985. On December 11, 1985, Lapeyrouse filed this action, CV-85-500231 as an independent action pursuant to Rule 60, ARCP.

9. On December 12, 1985, Judge Neilson vacated his order of November 5, 1984.

The granting of Lapeyrouse's requested TRO was improvident. Motions pursuant to Rule 60(b) do not effect the finality of a judgment or suspend its operation. Similarly, such a motion does not extend the time for taking of an appeal. *Crockrell v. World's Finest Chocolate, Inc.*, Ala., 349 So. 2d 1117 (1977). Rule 60, ARCP is not a substitute for appeal. *Daphne v. Caffey,* Ala., 410 So. 2d 8 (1981), citing *Marsh v. Marsh,* Ala. Civ. App., 388 So. 2d 422 (1976). Stay of execution may be had upon appeal. Rule 62(b) ARCP. Further, there was no showing of those matters mandated by Rule 65(b).

Looking at Petitioner's four (4) basic grounds in reverse order, it is clear that Lapeyrouse has not appealed from the judgment rendered on the jury verdict and thus has not exhausted its legal remedies.

As to Lapeyrouse's defenses and meritorious grounds for counterclaim, these appear to have been available at the original trial and are thus matters going to the merits of the case which are not proper grounds for motions under Rule 60(b) ARCP. *Daphne v. Caffey, supra.* It should also be noted that Judge Neilson did not grant Lapeyrouse's Motion for J.N.O.V. and that Lapeyrouse unsuccessfully attempted to appeal from that denial.

As to the claim that equity and good conscience demands the setting aside of this judgment, it is clear that the issue of whether the verdict is due to be set aside on the grounds that it is against the great weight and preponderance of the evidence is a proper matter for the trial judge, who heard the evidence ore tenus, on Motion for

New Trial, or for the appellate courts on appeal. However, "the law of Alabama does not entitle a party to relitigate issues which were raised or could have been raised in the prior suit." *McSween v. McSween,* Ala. Civ. App., 366 So. 2d 293 (1979), citing *Anderson v. Moorer,* 372 F. 2d 747 (5th Cir. 1967). It further appears that as to these grounds for relief, "the defendant is in effect utilizing Rule 60(b) as an appeal from the final judgment, which is not permitted under our rules. *Daphne v. Caffey, supra.*

Finally as to Lapeyrouse's first grounds, that of mistake, inadvertence, accident or excusable neglect, it is clear from Judge Neilson's affidavit, attached to Exhibit D filed herein, that he was, mistaken as to the law pertinent to filing judgments under Rule 58, ARCP. While this court would have, prior to the Supreme Court's ruling, been subject to the same mistake of law, a mistake of law is not a mistake, inadvertence, surprise or excusable neglect as embodies in ARCP 60(b) (1). Nor can a mistake of law be a basis for granting relief under ARCP 60(b) (6). *Boles v. Hooper and McDonald, Inc.,* Ala. Civ. App., 424 So. 2d 634 (1932).

For the reasons set out above, it appears that the instant action, CV-85-500231, is not ripe and is untimely filed, and Respondent Nelson's Motion to Dismiss is due to be granted. Further, in as much as Respondent Nelson was required to appear and defend the unsupported request for TRO filed by Petitioner, Respondent Nelson is entitled to attorney's fees for such defense and upon request of Respondent Nelson, the court will set a hearing to determine the amount of such attorney's fees.

The Ten Thousand ($10,000) Dollar bond posted for the TRO shall remain in effect for further orders on attorney's fees and costs. The second bond of Seven Hundred One Thousand Nine Hundred Twenty-one Dollars and Eighty-four Cents ($701,921.84) is discharged.

It is hereby ORDERED, ADJUDGED and DECREED that the TRO heretofore issued, as extended, is due to be and it is hereby dissolved. It is further ORDERED, ADJUDGED and DECREED that Respondent Nelson's Motion to Dismiss is granted without prejudice. Petitioner Lapeyrouse shall be taxed with the costs of these proceedings.

Done this 2 day of January, 1986.

/s/ Thomas B. Norton, Jr.,
Circuit Judge

I, Eunice G. Tindal, Register of the Circuit Court of Baldwin County, Alabama, do hereby certify that the foregoing is a correct copy of the original decree rendered by the Judge of the Circuit Court in the stated cause, which said decree is on file and enrolled in my office.

WITNESS MY HAND AND SEAL this the 3rd day of January, 1986.

/s/ Eunice G. Tindal
Register of Circuit Court, In Equity

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA

CIVIL ACTION NO. CV-85-500231

LAPEYROUSE GRAIN CORPORATION, and LAPEYROUSE GRAIN CORPORATION OF ALABAMA,

Plaintiffs,

vs.

FLORA JANE NELSON, individually and d/b/a W. J. NELSON COMPANY,

Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF ALABAMA

(Filed January 14, 1986)

Notice is hereby given that plaintiffs/appellants Lapeyrouse Grain Corporation and Lapeyrouse Grain Corporation of Alabama appeal to the Supreme Court of Alabama from the Order of the trial court dated and signed on January 2, 1986, and filed on January 3, 1986.

The Supreme Court of Alabama has jurisdiction inasmuch as the amount in controversy, exclusive of interest and costs, exceeds $10,000.00.

/s/ C. B. Arendall, Jr.
/s/ Alex F. Lankford
/s/ Caine O'Rear III

Of Counsel:

HAND, ARENDALL, BEDSOLE, GREAVES & JOHNSTON
Post Office Box 123
Mobile, Alabama 36601
(205) 432-5511

DATE FILED: Jan. 14, 1986

Certified as true copy:

/s/ Eunice G. Tindal
Register of Circuit Court

B-57

Office of
Clerk of the Supreme Court
State of Alabama
Montgomery

MAILING ADDRESS: TELEPHONE: 261-4609

P.O. Box 157
Montgomery, Alabama 36101

Re: 85-471

LAPEYROUSE GRAIN CORPORATION, ET AL.

Appellant

vs.

FLORA JANE NELSON, ET AL.

Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

—XX—Appeal docketed. Future correspondence should refer to the above number.

————Court Reporter granted additional time to file reporter's transcript to and including

————Clerk/Register granted additional time to file clerk's record/record on appeal to and including

————Appell—— granted 7 additional days to file briefs to and including

————Appellant(s) granted 7 additional days to file reply briefs to and including

————Record on Appeal filed

————Appendix Filed

————Submitted on Briefs

———Petition for Writ of Certiorari denied. No opinion.

———Application for rehearing overruled. No opinion written on rehearing.

———Permission to file amicus curiae briefs granted

———1/24/86 ajh

Robert G. Esdale, Clerk

By: /s/ Dorothy F. Norwood,
Deputy Clerk
Supreme Court of Alabama